

78-1686

Supreme Court, U.S.
FILED

MAY 7 1979

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1339

PAUL W. HOFFMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Gerald B. Lefcourt, on behalf of Petitioner Paul W. Hoffman, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on the 18th day of January, 1979.

Opinion Below

The Petitioner's conviction was affirmed by the Circuit Court from the bench and without written opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on January 18, 1979, and a

copy thereof is appended to this Petition as Appendix A. An order denying Petitioner's Petition for Rehearing was entered on March 8, 1979, and a copy thereof is appended to the Petition as Appendix B.

In an order dated March 27, 1979, this Court granted Petitioner's application for extension of time to file this Petition, and a copy thereof is appended to this Petition as Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

- I. Was the Petitioner Denied Due Process of Law Where the Trial Court, in Determining Sentence, Relied on Unsubstantiated and Unconfronted Hearsay, the Truth of Which was Disputed By the Petitioner, Alleging that Said Petitioner Was Involved in Previous Uncharged Criminal Transactions and Was More Culpable Than the Co-Defendant?
- II. Do the Informant Reliability Standards Enunciated in this Court's Holdings in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) Apply Where the Informant is a Participant in the Crime About Which He Provides Information?

Statutes, Federal Rules and Regulations Involved

No Statutes, Federal Rules or Regulations are involved.

Statement of the Case

The Petitioner, Paul Hoffman, and his co-defendant, Brook Hart, arrived in Kennedy Airport in New York on

February 20, 1978, following an international flight. The Petitioner cleared customs but Mr. Hart was found to be in possession of cocaine. Hart immediately "cooperated" and identified Petitioner as his accomplice. Two Special Agents went looking for the Petitioner, who was about to board a flight bound for San Francisco. They located Petitioner shortly thereafter and detained him for questioning. He gave inconsistent answers to their questions and, upon denying he knew Brook Hart, was placed under arrest. A warrant was subsequently issued to search Petitioner's baggage and cocaine was found therein.

The foregoing facts formed the basis of a motion to suppress on the grounds that the arrest of Petitioner was without probable cause. The motion was denied following a hearing at which the two agents and the defendant testified. Second Circuit law assumes the reliability of information received from a participant-informant and therefore does not apply the standards enunciated in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

The Petitioner thereafter entered a plea of guilty to importation of a controlled substance, 21 U.S.C. § 952.

Prior to sentencing, Mr. Hoffman's attorney read the pre-sentence report prepared for the court and took issue with several allegations contained therein. Specifically, counsel objected to, and proffered information to rebut, allegations that the defendant had been involved in previous drug dealings and that he was the more culpable of the two defendants. The source of the information was the co-defendant who had previously plead guilty.

Despite counsel's objections, made in a letter sent to the Court prior to sentencing and repeated at the time of sentencing, the Court refused to permit further inquiry by defense counsel and made no effort to substantiate the critical allegations contained in the pre-sentence report

and elsewhere. Instead, the Court ruled that it had made all the credibility determinations it need make at the previous suppression hearing. Thus, the Court ruled:

"Same credibility question on a limited issue. It is somewhat the same credibility. The issue is somewhat the same as that which was presented at the suppression hearing. And it seems to me that in those—if that is your position on sentencing, that I don't know any reason why I should believe Mr. Hoffman's account of the relative responsibilities at the time of sentencing than I did at the time of the suppression hearing. In fact, I have determined that Mr. Hoffman is somewhat more—was somewhat more culpable at the time of the offense than Mr. Hart. But I base that not only on Mr.—what I have here from Mr. Hoffman on the stand and what I have here from the agents and what I have seen in the probation report and other circumstances¹ concerning Mr. Hoffman's background which lead me to believe that Mr. Hoffman is somewhat more involved in this trade than he makes out.

That's a determination that any judge is going to have to make, and I'm not making it because I have reached any conclusion concerning Mr. Hoffman's general character. It's because I have had the advantage of hearing his testimony on the issue. So I'm quite will-

¹ At one point, in open court, the Assistant United States Attorney declared:

"Mr. Selafani: During the course of preparing this case for both indictments I had occasion to debrief extensively the co-defendant in this case, for one, Mr. Hart, and Mr. Hart had indicated that he, of course, had a rather long-standing prior relationship with this defendant and this defendant had advised him that on a number of occasions he had brought into the country from various different cities, Miami, for one, on prior occasions, cocaine."

ing to—in fact, I'm going to proceed with the sentencing."

The Court thereupon sentenced Petitioner to a five year term of imprisonment to be followed by a special parole term of five years. Brook Hart, at a separate hearing, received a sentence of one and a half years imprisonment which was subsequently reduced to one year imprisonment.

Reasons for Granting the Writ

POINT I

The Petitioner was denied due process of law where the trial court, in determining sentence, relied on unsubstantiated and unconfronted hearsay, the truth of which was disputed by the Petitioner, alleging that said Petitioner was involved in previous uncharged criminal transactions and was more culpable than the co-defendant.

The Petitioner invokes the jurisdiction of this Court to review the trial court's *de facto* ruling that it may predicate sentencing upon uncorroborated and inherently unreliable hearsay contained in a pre-sentence report, without affording counsel an opportunity to inquire into the veracity of challenged allegations contained therein. Petitioner in effect asks the Court to finally provide guidance to trial courts regarding what is undoubtedly the most significant yet hopelessly confused issue in criminal law today: the extent to which Due Process standards apply in the sentencing of non-capital cases. Currently, more than 80 percent of all criminal defendants plead guilty. Thus, to the overwhelming majority of defendants, the only significant decision made by the criminal justice system involves sentencing. Yet, despite the constant guidance this Court has given regarding the procedures which must be utilized to insure fairness for the minority of

defendants who go to trial, no such direction has been given to the trial courts regarding the procedures to be followed at sentencing. The rules of evidence are not applicable at sentencing and the courts have been left to chart their own course.

The vacuum created by the failure to develop minimum Due Process standards at sentencing has resulted in utter confusion between and within the Circuits. For example, the Ninth Circuit appears to have required that hearsay allegations be corroborated;² cases within the Fifth Circuit put the burden upon the defendant to disprove allegations with which he takes issue,³ as, apparently, does the Eighth Circuit.⁴ The Second Circuit has taken varied positions on the subject.⁵ And Judge Weinstein of the Eastern District of New York recently concluded in a lengthy and scholarly opinion that the government must prove the truth of critical allegations contained in a pre-sentence report by "clear, unequivocal and convincing" evidence.⁶

The failure of this Court to previously hold that minimal Due Process standards apply to all sentencing proceedings stands in stark contrast to its rulings in related areas. Welfare recipients cannot be deprived of their support payments without being accorded minimal Due Process, including the right to present witnesses and cross-

² *United States v. Weston*, 448 F.2d 626 (9th Cir. 1970), cert. denied, 404 U.S. 1061 (1972).

³ *United States v. Battaglia*, 478 F.2d 854 (5th Cir. 1972); *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973).

⁴ *United States v. Dace*, 502 F.2d 897 (8th Cir. 1974).

⁵ Compare *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973) and *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

⁶ *United States v. Fatico*, 458 F.Supp. 388 (E.D.N.Y. 1978) (Weinstein, J.).

examine the witnesses against them.⁷ Parolees and probationers cannot be deprived of their conditional freedom without "minimum" procedural safeguards, which include the right to present evidence, to cross examine adverse witnesses and to receive a statement of reasons if parole or probation is revoked.⁸ Yet a defendant whose Liberty has never been taken from him often faces his only significant day in court with no more "Due Process" than the trial court agrees to provide him. As Justice Douglas said twenty eight years ago:

When discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.⁹

That a man may be sentenced to a term of imprisonment based upon allegations of bad deeds for which he was never charged and which remain unsubstantiated offends our most basic notions of fairness. Yet the practice continues unabated in the absence of a ruling by this Court that it will not be tolerated.

The decisions rendered thus far by the Court bearing upon the issue at hand have been equivocal. *Williams v. New York*,¹⁰ held that, at least in the absence of an objection to allegations contained in a pre-sentence report, Due

⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁸ *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

⁹ *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

¹⁰ 337 U.S. 241 (1949).

Process does not apply at sentencing. Yet other cases¹¹ have held that a defendant has a right not to be sentenced upon misinformation, and in the recent case of *Gardner v. Florida*,¹² at least five Justices in some way utilized the Due Process Clause in reversing a death sentence predicated in part upon undisclosed information. Mr. Justice Stevens, joined by Mr. Justice Stewart and Mr. Justice Powell in fact concluded that "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."¹³

The significance which Petitioner sees in the way in which *Gardner* was decided is in this Court's deviation from its previous practice of relying upon the Eighth rather than the Fifth Amendment in analyzing the propriety of imposing the death sentence. Mr. Justice White, concurring in *Gardner*, recognized the importance of this shift in approach, although he disagreed with it:

I . . . see no reason to address in this case the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered in this case.¹⁴

The *Gardner* court, in distinguishing *Williams v. New York*, *supra*, noted that *Williams* itself had recognized a need to reexamine capital sentencing procedures with the passage of time and against evolving standards of fairness.¹⁵ Petitioner submits that several trends enunciated by this Court suggest that the *Gardner* plurality's applica-

tion of Due Process Standards to capital sentencing proceedings apply to non-capital proceedings as well. Sentencing has for a long time now been keyed towards rehabilitation and judges are no longer straight-jacketed in the imposition of sentence. But at the same time, this new freedom on the part of the judiciary has turned what was once a "legal" determination into a "fact-finding" process. If this procedure is to work it must attempt to find facts accurately and fairly. There is no better way of doing this than by including the defendant in the fact finding process in a meaningful way. Congress in 1975 mandated the disclosure of pre-sentence reports.¹⁶ This admirable development becomes meaningless if the defendant is not permitted to challenge its contents and demand verification of essential disputed facts.

In the case at bar, Petitioner was sentenced in part upon information received from the co-defendant who told the Probation Department and the Assistant United States Attorney that the Petitioner had been involved in previous drug transactions and that Petitioner was more culpable than he. The inherent unreliability of such statements by one who seeks to ingratiate himself with the government and the court and to shift blame from himself to another is too obvious to dwell on.¹⁷

Yet the trial court refused to permit Petitioner to confront the co-defendant and refused to verify the information in any way before relying on it. It is submitted that such a practice is inherently unfair and represents a palpable denial of Due Process.

Wherefore, Petitioner invokes the jurisdiction of this Court to vacate the sentence unlawfully imposed upon him.

¹¹ See, e.g., *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Tucker*, 404 U.S. 443 (1972).

¹² 430 U.S. 349 (1977).

¹³ 430 U.S. at 357-358.

¹⁴ 430 U.S. at 364.

¹⁵ 430 U.S. at 357.

¹⁶ Rule 32(c)(3), Federal Rules of Criminal Procedure.

¹⁷ See *Bruton v. United States*, 391 U.S. 123, 136 (1968).

POINT II

The informant reliability standards enunciated in this Court's holdings in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), apply where the informant is a participant in the crime about which he provides information.

In *Aguilar v. Texas*,¹⁸ this Court held that an application for a warrant which relies upon information received from an informant must meet two requirements. Firstly, the affidavit must set forth "underlying circumstances" from which an independent magistrate can judge the validity of the conclusions contained therein, and, secondly, the affiant must set forth sufficient facts to demonstrate that the informant was "credible" and his information "reliable." In *Spinelli v. United States*,¹⁹ it was held that if the informant's "tip" fails to satisfy the *Aguilar* requirements, the magistrate should look at any independent corroboration provided in the report to ascertain whether the corroborative material, when added to the informant's information, renders the affidavit as trustworthy as if the informant's information was sufficient by itself.

Despite the clarity of these requirements and the failure of this Court to limit them in any manner, several Circuits, including the Second Circuit,²⁰ have held that the rules enunciated in *Aguilar-Spinelli* have no application where the information upon which a warrantless arrest is based was received from a "participant informant." Thus, in the case at bar neither the trial court nor, apparently, the Court of Appeals through its bench af-

¹⁸ 378 U.S. 108 (1964).

¹⁹ 393 U.S. 410 (1969).

²⁰ See *United States v. Rueda*, 549 F.2d 865 (2d Cir. 1977); *United States v. Miley*, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975); *United States v. Rollins*, 522 F.2d 160 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976).

firmance tested the validity of the Petitioner's arrest by application of *Aguilar* and *Spinelli*.

The reasons for the Circuits having created the participant informant exception are unclear, but two rationalizations have been advanced. Firstly, it has been stated that a participant in a crime is somehow "inherently" reliable, thereby rendering the application of *Aguilar* and *Spinelli* unnecessary.²¹ Secondly, it has been said that if *Aguilar* and *Spinelli* were applied in the context of the participant informant, no valid warrantless arrests based upon such information would be possible, because the informant had not been used in the past.²²

As to the first reason cited above, it is unclear why a recently arrested participant informant should be considered more reliable than the informants used in *Aguilar* and *Spinelli*. If anything, they are less reliable and the strict application of this Court's rules become even more necessary to insure compliance with the fundamental probable cause requirement. As this Court has stated in the context of one defendant making a statement inculpating another, such information is "inevitably suspect . . . given the recognized motivation to shift blame to others."²³ Yet for some reason, the Second Circuit and other Circuits have given extra credence to the self serving finger-pointing of one who has recently been arrested.

There may be some justification in finding a participant inherently reliable when he has voluntarily "turned himself in" prior to inculpating another. But such is surely not the case where the participant was involuntarily arrested and seeks only to ingratiate himself with the police. As one commentator has written:

²¹ *United States v. Dunloy*, 584 F.2d 6 (2d Cir. 1978).

²² See *United States v. Miley*, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 843 (1975).

²³ *Bruton v. United States*, 191 U.S. 123, 136 (1968).

. . . courts should recognize a distinction between the participant who walks into the police station to make an incriminating admission and the participant whom the police have sufficient evidence to convict before he supplies the information relied upon. No common sense rationale for believing the second type of participant informant is present since he has nothing to lose by providing the self serving admission.²⁴

As to the second rational often forwarded in support of ignoring the *Aguilar-Spinelli* requirements when a participant informant is involved, it is simply not true that but for the "participant informant exception" the police would be unable to make a warrantless arrest upon information received from a previously unknown arrestee. *Spinelli* explicitly holds that information received from a "fledgling" informant may support a finding of probable cause so long as it is sufficiently corroborated by independent sources.²⁵ Thus, there is no reason whatever for ignoring the clear rules set forth by this Court merely because the informant is a participant, and in fact, careful application of this Court's precedent becomes even more important.²⁶

In the case at bar, the validity of the arrest of the Petitioner was not tested against the standards so carefully laid down by this Court due to the erroneous rule of this Circuit that such standards did not apply.

Wherefore, Petitioner invokes the jurisdiction of this Court to review the denial of his motion to suppress.

²⁴ Comment, *Reliability and the First Time Informant*, 1 Am. Jur. Crim. L. 283, 295 (1972).

²⁵ 393 U.S. at 415.

²⁶ Most of the applicable cases in fact require some corroboration of at least "innocent" aspects of the participant-informant's tip, but do so outside the constraints of *Spinelli*. See, e.g., *United States v. Dunloy, supra*, fn. 21, 584 F.2d at 10.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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 148 East 78th Street
 New York, New York 10021

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court-house in the City of New York, on the eighteenth day of January one thousand nine hundred and seventy-nine.

Present: Hon. J. EDWARD LUMBARD

HON. LEONARD P. MOORE
 HON. WILLIAM H. MULLIGAN
 Circuit Judges.

78-1339

UNITED STATES OF AMERICA,
 Plaintiff-Appellee,
 v.

PAUL W. HOFFMAN, and BROOK L. HART,
 Defendants,
 PAUL W. HOFFMAN,
 Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
 Clerk

By: ARTHUR HELLER,
 Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of March, one thousand nine hundred and seventy-nine.

78-1339

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

PAUL W. HOFFMAN,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Paul W. Hoffman, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Irving R. Kaufman,
Chief Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES
No. A-838

PAUL HOFFMAN,
Petitioner,
v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 7, 1979.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of March, 1979.

RECEIVED
Mar 29 1979
GERALD B. LEFCOURT
Attorney-at-Law